

# **FAIR PAY AND SAFE WORKPLACES PROPOSED GUIDANCE AND REGULATIONS PUBLIC Q&A**

## **Overview**

### **Why are the proposed regulations and proposed guidance being issued?**

- The proposed Federal Acquisition Regulatory Council (FAR Council) regulations and proposed Department of Labor (DOL) guidance implement Executive Order (EO) 13673, Fair Pay and Safe Workplaces, which was signed by the President on July 31, 2014.
- The goal of the EO is to increase efficiency and cost savings in Federal contracting by ensuring that the parties with which the Government contracts are responsible and provide basic workplace protections. The Federal government should be doing business only with companies that comply with laws that protect workers' safety, wages, and civil rights. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and produce good results.
- The EO will require prospective federal contractors to disclose their violations of certain workplace protection laws prior to receiving a contract award. Agencies will use this information to determine whether prospective contractors are responsible sources who should be awarded a contract. For those contractors who are not in compliance, agencies will work with them to make sure they understand their responsibilities and try to address any issues that can be remedied to bring them into compliance.
- Taking these steps will also ensure that companies that play by the rules do not have to compete against bidders who put in lower bids by cutting corners on workers' fair pay and safety. And, it will also ensure that all hardworking Americans get the fair pay and safe workplaces they deserve.

### **What steps have been taken to reduce the burden of this EO on federal contractors?**

- A number of steps have been taken to limit the burden on contractors. In particular:
  - The processes set forth in the proposed guidance and proposed regulations build on the existing federal procurement policies and practices with which contractors are familiar.
  - Most federal contractors are compliant with the workplace protections covered in the EO and will be able to attest that they have no violations in the preceding three years.
  - DOL will be setting up an office to help contractors and subcontractors understand their responsibilities under the EO and comply with relevant law.
  - Parts of the rule will be phased in over time.

- Companies will report violations in the same system they are already using to meet other procurement requirements.
- Companies will have an opportunity to identify and remedy potential problems before proposing on contracts.
- Finally, work is ongoing to create better interfaces for contractor-government interactions so that contractors can do all of their reporting at one site.

**What assistance is there for small businesses and minority contractors who may have greater difficulty in complying with the Executive Order?**

- The EO does not impose any new obligations on government contractors to comply with basic workplace protections. The obligation to comply with basic workplace protection laws is long-standing for all employers covered by those laws, including government contractors. The EO only adds the requirement that prospective contractors share information about their compliance history before being awarded a contract.
- That said, there is help for these employers to comply with the law and the requirements of the EO.
  - DOL, the National Labor Relations Board, and the Equal Employment Opportunity Commission all provide extensive compliance assistance services for employers, including government contractors. DOL has several compliance assistance programs that specifically help small businesses.
  - DOL will work with Labor Compliance Advisors across contracting agencies to help ensure efficient, accurate, and consistent decisions across the government.
  - DOL personnel will also be available to consult with contractors regarding their obligations under the EO.
  - Finally, if the contracting officer makes a determination of non-responsibility involving a small business, the prospective contractor must be notified of the decision and be given the opportunity to apply to the Small Business Administration (SBA) for a “certificate of competency.” In accordance with long-standing laws and rules for this appeal process, if the SBA certifies the small business to be capable and competent for the specific government contract, then the certificate would override the responsibility decision made by the contracting officer.

**How will federal contractors and other stakeholders have input into the process?**

- In developing the regulations and guidance, the Administration consulted extensively with federal contractors and other stakeholders to get input on how best to achieve the goals of the EO and make this system work as well as possible.

- In addition, the proposed guidance and regulations will be subject to a notice and comment process, providing any interested party with the opportunity to share its views. The Administration will carefully consider this feedback in developing final guidance and regulations.

## **Scope and Timeline**

### **How many contractors will be impacted?**

- An estimated 22,150 contractors will be subject to the rule because they are bidding on covered contracts that exceed the \$500,000 threshold.
- Only a small share of these companies are expected to have reportable violations, and even fewer are expected to have serious, willful, repeated, or pervasive violations to report, and a significantly smaller share would be expected to be deemed a non-responsible source, once mitigating factors like remediation steps and violations relative to size are taken into account.
- The vast majority of bidders will only have to attest that they have no violations of the workplace protection laws identified in the EO in the preceding three years.

### **What types of contracts are covered?**

- The proposed regulations and guidance would apply to new contracts for goods and services, including construction, where the estimated value exceeds \$500,000 over the life of the contract.
- The proposed regulations and guidance would also cover new subcontracts for goods and services, other than commercially available off-the-shelf items, where the estimated value of goods and services exceeds \$500,000 over the life of the contract.

### **Which violations of workplace protections must be disclosed?**

- Before they can receive a contract, prospective contractors must disclose violations from the past three years of 14 basic workplace protections, including those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections.
- Specifically, the following federal laws and executive orders are covered:
  - the Fair Labor Standards Act;
  - the Occupational Safety and Health Act;
  - the Migrant and Seasonal Agricultural Workers Protection Act;
  - the National Labor Relations Act;
  - the Davis-Bacon Act;
  - the Service Contract Act;

- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
  - Section 503 of the Rehabilitation Act of 1973;
  - the Vietnam Era Veterans' Readjustment Assistance Act;
  - the Family and Medical Leave Act;
  - Title VII of the Civil Rights Act of 1964;
  - the Americans with Disabilities Act of 1990;
  - the Age Discrimination in Employment Act of 1967; and
  - Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).
- While the EO also covers equivalent State laws, they—with the exception of occupational safety and health “State Plans” that have been formally approved by OSHA—will not be covered in this first phase of implementation.

### **What is the timeline for implementation?**

- Over the next two months, DOL and the FAR Council will receive comments from the public on their proposed approach for implementing the EO. Based on this feedback, they will revise their guidance and regulation and publish final versions in late 2015 or early 2016.
- To give contractors and contracting agencies more time to adjust to the new process, requirements related to subcontractors and equivalent State laws (with the exception of occupational safety and health laws) will be phased in at a later date.

### **Required Disclosures**

#### **How will contractor disclosure work?**

- The System for Award Management (SAM) will be modified to allow a contractor or prospective contractor to disclose whether they have violations of any of the enumerated workplace protections within the previous three-year period as part of the representation and certification process and, if so, include additional information on the specific violations in the Federal Awardee Performance and Integrity Information System (FAPIS).
- This is a “submit once, use many times” process. Before submitting a bid for a new contract, a contractor would need to make sure that its information in SAM is up-to-date, and if it wins the award, the record would have to be updated every six months.
- When bidding on contracts, prospective contractors will be required to update their annual disclosures in SAM to make sure they reflect violations within the past three-year period. For the vast majority of contractors who have no relevant violations, they will be able to meet this requirement by only attesting once a year indicating their compliance.

#### **What violations will need to be disclosed?**

- A prospective contractor will have to disclose the following information prior to the award of a contract for goods and services (including construction) valued at greater than \$500,000:
  - Any court order or judgment issued in the past three years finding a violation by the contractor of any of the basic workplace protections identified in the EO, or enjoining or restraining the contractor from violating any of those basic workplace protections;
  - Any arbitrator’s decision or award issued in the past three years finding a violation by the contractor of any of the basic workplace protections identified in the EO, or enjoining or restraining the contractor from violating any of those basic workplace protections; and
  - Any merits determination issued in the past three years by an enforcement agency indicating a violation of one of the basic workplace protections identified in the EO. The proposed DOL guidance explains which agency-issued documents constitute administrative merits determinations under the EO.

**Some of the administrative merits determinations that contractors must disclose are complaints issued by enforcement agencies. Shouldn’t a finding be required before contractors must disclose a violation, rather than a mere complaint?**

- Administrative merits determinations are the products of expert government investigators doing extensive fact finding and exercising informed judgment that a violation of the law has taken place.
- The complaints issued by enforcement agencies that are included in the definition of “administrative merits determination” are not akin to complaints filed by private parties to initiate lawsuits in federal or state courts. Each complaint included in the definition represents a finding by an enforcement agency—following a full investigation—that a labor law was violated.
- In contrast, a complaint filed by a private party in a federal or state court represents allegations made by that plaintiff and not an enforcement agency; such complaints are not administrative merits determinations. Similarly, employee complaints made to enforcement agencies (such as a complaint for failure to pay overtime wages filed with the DOL’s Wage and Hour Division or a charge of discrimination filed with the Equal Employment Opportunity Commission) are not administrative merits determinations.
- As noted in the proposed DOL guidance, to the extent a civil judgment, administrative merits determination, or arbitral award or decision is not final, it should be given lesser weight by the contracting officer in making a responsibility determination.

### **Evaluating Contractor Disclosures**

**Are contracting officers concerned with all types of violations?**

- No. Consistent with the proposed DOL guidance, contracting officers will only consider those violations that are serious, willful, repeated, or pervasive in determining whether a contractor is responsible.
- Serious, willful, repeated, and pervasive violations encompass only the most egregious violations, and the vast majority of contractors will have no violations of these types. For those that do, agencies will make every effort to help those contractors come into compliance.

**Will a contractor lose federal contracts for a single violation?**

- No. The EO and proposed guidance and regulations specifically state that in most cases a single violation of law may not give rise to a determination of lack of responsibility. In making responsibility determinations, contracting officers are directed to consider a range of factors, including whether violations are serious, repeated, willful, or pervasive; and mitigating factors, including what remedial steps the contractor has taken to fix identified problems, the number of violations relative to contractor size, and the existence of robust internal reporting structures.
- Further, in most cases where violations require corrective actions, contractors will be given a chance to enter into labor compliance agreements to address any outstanding violations. The goal of this process is to bring contractors into compliance with workplace protection laws, not to penalize them for a single violation.

**Can a contract be denied or taken away based solely on employee allegations?**

- No. The EO directs contracting officers, in consultation with Labor Compliance Advisors and DOL, to consider administrative merits determinations, arbitration decisions and awards, and civil judgments in making determinations of a contractor's business integrity and ethics.

**Who decides if a contractor's violations are serious, willful, repeated, or pervasive?**

- Contracting officers at the relevant agency will make these decisions utilizing the proposed DOL guidance, in consultation with the agency Labor Compliance Advisor and/or DOL.

**Will contractor disclosures on workplace violations be made public?**

- The proposed rule would require contractors to publicly disclose whether they have violations of covered laws within the last three years and, for prospective contractors being evaluated for responsibility, certain basic information about the violation.
- The proposed rule would not compel disclosure of additional documents the prospective contractor deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures, and other steps taken to achieve compliance with workplace protections.

- The proposed regulations request comment on whether other information disclosed through the process should be made public.

**Will contractors with labor violations have an opportunity to present information on their remediation steps?**

- Yes. The EO requires the contracting officer, as part of the responsibility determination, to provide the prospective contractor with an opportunity to disclose any steps taken to correct violations or improve compliance with labor laws as well as any other mitigating factors, including the contractor's good faith and reasonable grounds for its actions. This will be taken into account in determining whether the prospective contractor is a responsible source.
- In addition, if the contracting officer makes a determination of non-responsibility involving a small business, the prospective contractor must be notified of the decision and be given the opportunity to apply to the SBA for a "certificate of competency." In accordance with long-standing laws and rules for this appeal process, if the SBA certifies the small business to be capable and competent for the specific government contract, then the certificate would override the responsibility decision made by the contracting officer.

**Will contractors have to address all existing violations before getting a contract?**

- No. The focus is not on all violations—it is on those that are serious, willful, repeated, or pervasive. In some cases, issues may not need to be addressed for the contractor to be determined to be responsible. However, as a general rule, remediation will help.

**Can contractors seek advice from an enforcement agency prior to bidding on a contract?**

- We plan to implement a process by which, prior to bidding, contractors with violations can disclose them to enforcement agencies to discuss whether they qualify as serious, willful, repeated, or pervasive and, if so, what remediation the contractor has already taken and what steps need to be taken to come into compliance.
- Any agreed-upon remediation plans would be considered by federal contracting officers in their responsibility determinations.
- We will encourage contractors to engage with enforcement agencies early when they know they have violations that may require remediation, so that the results of those engagements can be used by contracting officers to help establish responsibility when a contractor bids for work, and avoid having these steps disrupt the contracting process.

**What responsibilities do prime contractors have with regard to subcontractors' violations?**

- Contractors already have the legal obligation to make responsibility determinations for their subcontractors. The proposed regulations and proposed guidance will help contractors make

these determinations by providing them with additional information on which to base their judgments.

- Prime contractors will receive similar disclosures from their subcontractors with covered contracts over \$500,000 that the prime contractors give to contracting officers. (This will not apply to subcontracts for commercially available off-the-shelf items.) Prime contractors will then have to consider this information in determining whether a prospective subcontractor is a responsible source with a record of integrity and business ethics. DOL will be available to consult with contractors regarding these determinations.
- The proposed FAR regulation specifically seeks comment on ways to ensure that the subcontractor responsibility determination process is clear and manageable for prime contractors. One alternative being considered would allow the contractor to direct the subcontractor to consult with DOL on its violations and remedial actions and then report back to the prime contractor on DOL's response. Under this approach, the rule would make clear what would serve as a reasonable basis for the prime contractor to make a responsibility determination based upon what the subcontractor represents about its communications with DOL.
- To ensure that contractors and subcontractors have time to adjust to these new requirements, the subcontractor reporting requirements will be phased in at a later date. We look forward to hearing from contractors about what training and information they need to comply with these requirements, and how to make the process work as efficiently as possible.

#### **How is this different from the existing Suspension and Debarment procedures?**

- Suspension and debarment procedures play an important role in the procurement process. They serve to exclude from the federal contracting process those contractors whose performance on a federal contract is so poor that it serves the public interest to preclude them completely from receiving additional contracts.
- The processes and tools DOL and the FAR Council are establishing are designed to help in identifying and addressing labor violations before they require consideration of suspension and debarment.
- Contracting officers will not be compelled to deny any prospective contractor the award of a contract because of a labor law violation. Instead, the contracting officers will make responsibility determinations based on violations and mitigating factors, including the extent to which a contractor has taken steps to negotiate compliance agreements with enforcement agencies to correct past problems and avoid future ones.
- In some cases, contractors may need to be considered for suspension and debarment because of the seriousness of their violations and the failure to take remedial actions. The EO does not, in any way, alter the suspension or debarment process, or long-standing principles of fairness and due process built into those procedures. However, the expectation is that the

processes and tools envisioned by the EO will reduce the need for an agency to consider suspension and debarment and help contractors avoid the consequences of those remedies.